Filed 11/27/12 Chevy Chase Bank v. St. Geme CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

CHEVY CHASE BANK FSB, Plaintiff and Respondent, v. PETER ST. GEME et al. Defendants and Appellants.	A132972 (San Francisco City & County Super. Ct. No. CUD-09-630948)

INTRODUCTION

Appellants Peter St. Geme and Polly St. Geme (the St. Gemes) were named as defendants in an unlawful detainer case, when they refused to move from their home which had been foreclosed upon. On the day set for trial, they signed a stipulation for judgment in the unlawful detainer case, which stipulation gave them the opportunity to repurchase their home. No repurchase occurred, and ultimately the Superior Court entered the judgment called for by the stipulation. The St. Gemes filed a motion to set aside that judgment, which the trial court denied. The St. Gemes appeal from that denial. We affirm.

BACKGROUND

The Underlying Facts

In October 2006 the St. Gemes executed a promissory note in the amount of $10,000,000, payable to Triton Commercial Capital, Inc. The note was secured by the property described as "2799 Pacific Avenue and 2498 Divisadero," San Francisco (the property). The St. Gemes defaulted on the note, foreclosure proceedings were initiated,

and in 2009 respondent Chevy Chase Bank FSB (Chevy Chase) bought the property at the foreclosure sale. The trustee's deed upon sale was recorded on June 10, 2009, and on June 23 Chevy Chase served the St. Gemes a three-day written notice to vacate the property. They did not, and the within action followed.

The Proceedings Below

On September 29, 2009, Chevy Chase filed a verified complaint for unlawful detainer and damages. The St. Gemes filed a demurrer, which was overruled, and on January 26 they filed their answer. On February 8, 2010, the case was set for trial, originally for February 22, and then continued to February 24. On that date the parties entered into a "Stipulation For Judgment and Judgment Thereon," which stipulation would ultimately give rise to the issues here. The stipulation was four pages in length and provided in pertinent part as follows:

"Wherefore, Plaintiff [Chevy Chase] and Defendants [the St. Gemes] wish to delay a lockout in order to facilitate a potential repurchase agreement, and;

"Wherefore, Plaintiff wants to avoid prejudice caused by a delay of trial in the event a repurchase agreement is not successful, and;

"Wherefore, Plaintiff and Defendant[1] wish to prevent further attorney's fees and costs in connection with the unlawful detainer, and;

"Wherefore, Plaintiff and Defendant wish to gain a sense of security repose by settling on a move-out date in the event a repurchase agreement is not successful;

"It is hereby stipulated by and between the parties hereto, Chevy Chase Bank, FSB, by and through Pite Duncan, LLP, attorneys of record for Plaintiff, and Peter E. St. Geme, Polly P. St. Geme, Defendants, that judgment in the above entitled action be entered as follows:

"1. Judgment shall be entered in favor of Plaintiff for possession of 2799 Pacific Avenue, San Francisco, CA 94115 (hereinafter the "Subject Premises").

[1] Despite its introduction (which uses the plural "defendants"), the stipulation uses the singular in most references.

"2. A writ of possession may issue immediately, but no lockout shall occur before April 10, 2010.

"3. If Defendants repurchase the Subject Premises and title transfers from Plaintiff to Defendant prior to Defendants surrendering possession, Plaintiff agrees to stipulate to quash the writ, vacate the instant judgment, and dismiss the instant action with prejudice.

"4. Defendant and any others in possession 2799 Pacific Avenue, San Francisco, CA 94115 (hereinafter the 'Subject Premises') shall completely vacate and remove all of their personal property from the Subject Premises, Defendant shall deliver vacant possession of the Premises to Plaintiff on or before April 9, 2010, and All keys to the Premises shall be delivered to Defendant's counsel to be forwarded to Plaintiff's counsel. [¶] . . . [¶]

"9. Defendant agrees not to file any pleadings in this action, or if Defendant has previously filed a pleading in this action, then Defendant agrees not to file any further pleadings in this action including, but not limited to, the filing of a motion to set aside the judgment(s), the filing of an appeal of the judgment(s), the right to seek a stay of the writ of possession and/or lockout, and the right to seek relief from forfeiture. [¶] . . . [¶]

"11. This is a resolution of a disputed claim; nothing contained herein shall be construed as an admission.

"12. Time is of the essence.

"13. Each of the parties hereto agrees to execute such other documents and instructions as may be necessary to implement or effectuate this Stipulation, and further agrees to give reasonable cooperation and assistance to any other party or parties hereto in order to enable such other party or parties to secure the intended benefits of this Stipulation."

The stipulation was signed by the St. Gemes and their attorney, Michael Heath, and by William Partridge, the attorney for Chevy Chase. No one at Chevy Chase signed.

The stipulation was filed with the court, but the trial court did not order judgment as contemplated by the stipulation, instructing counsel for Chevy Chase to prepare a

separate order. Counsel submitted a proposed order on March 10, 2010, which apparently was not acted upon.

As to what occurred over the next many months, the appellants' appendix filed by the St. Gemes is unhelpful. Most, if not all, of the papers filed in that time frame are not in the appendix, and there is no reporter's transcript of any hearing before May 10, 2011. We thus piece together what occurred by reference to the register of actions and based on representations in the parties' briefs that go unchallenged by the other side. One fact that does emerge is that the St. Gemes did not repurchase the property by April 9, 2010, the deadline provided in the stipulation—indeed, they apparently did not even make an offer by that date.[2]

As we understand it, what happened was that on March 15, 2010, the St. Gemes requested a proposed purchase price, and Chevy Chase provided one on March 23, and again on March 25. The price was $11,647,304.13, a price valid through March 31. There is no indication that the St. Gemes countered, let alone accepted, this offer before it expired.

Then, on April 7, 2010, Chevy Chase's attorney William Partridge responded to the St. Gemes's request "for a revised figure for the repurchase agreement [and] a contact person at the bank to negotiate with. . . ." Mr. Partridge wrote as follows:

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[2] The St. Gemes's opening brief states that "[o]n April 9, 2010, Peter [St. Geme] wrote to Respondent's counsel offering to repurchase the Property for 'full appraisal value of the property.' " The referenced exhibit does not support the statement. The exhibit is a letter from Mr. St. Geme to Chevy Chase's attorney dated April 15, 2010, which letter provides in its entirety as follows:

"Mike Heath advised me to submit my offer directly to you rather than indirectly through Mr. Heath as I did on Friday, April 9, 2010, in reaction to your email instruction to Mr. Heath on April 7, 2010.

"I am offering to repurchase the subject property at a price equal to its **FULL APPRAISAL VALUE.**

"I am prepared to execute escrow at an entity of Chevy Chase Bank's choosing.

"Please advise."

"Your client needs to write and submit an offer, and then my client can counter it if they are not willing to accept. It is a significant undertaking for my client to calculate the outstanding costs, and it was fruitless the last time since no offer ever came of it so they aren't going to want to do it again until he at least submits an offer."

As indicated, on April 15, 2010, the St. Gemes submitted to Chevy Chase an "offer" to repurchase the property for its "full appraisal value." The purported offer included no other terms, and did not even specify when the appraisal was to be performed or by whom. The St. Gemes submitted no evidence that Chevy Chase accepted any such "offer." And there is no indication in the record of any other communication concerning the repurchase of the property for many months, not until February 2011.

Meanwhile, there was a flurry of activity on the pleading front, most of which we learn only from the register of actions, which indicates the following:

On May 24, 2010, Chevy Chase filed an ex parte application for order to enter judgment.

On May 28, 2010, the St. Gemes filed an ex parte application for "order no further action" until Chevy Chase performed on settlement agreement.

On July 7, 2010, the court rejected a default judgment submitted by Chevy Chase. And did so again on November 2.

On January 20, 2011, Chevy Chase filed an ex parte application for order to enter judgment. A default judgment was again rejected by the court, the next day, January 21.

On February 10, 2011, the stipulation for judgment was refiled, and on that date the trial court (Honorable Ellen Chaitin) signed an "Unlawful Detainer Judgment Pursuant to Stipulation," that "Plaintiff Chevy Chase Bank FSB its successors and or assigns recover from defendants [the St. Gemes] the restitution and possession of" the property.

On February 18, 2011, the St. Gemes filed a motion to set aside the judgment, set for hearing on March 17. This was followed by an ex parte application to stay execution of judgment, filed March 3.

On March 4, 2011, Chevy Chase filed its opposition.

On March 7, 2011, the St. Gemes filed another ex parte application to stay execution of judgment, and on March 8 execution was stayed. Then, apparently following a hearing on March 21, Judge Chaitin entered an order that day vacating the judgment entered February 10, 2011.

While this was going on, on February 9, 2011, Chevy Chase made an offer to allow the St. Gemes to repurchase the property for $12,236,185.13, an offer that would remain valid until February 18. That offer was rejected.

In early April 2011, apparently April 7, Chevy Chase filed some pleading seeking that judgment be entered.[3] On April 25, the St. Gemes filed opposition, including declarations from Mr. St. Geme and attorney Howard Olsen, of counsel at Heath's firm. Apparently on May 3, 2011, the court requested additional briefing, and on May 9, the St. Gemes filed another brief along with a supplemental declaration.

The matter came on for hearing on May 10, 2011, before Judge Chaitin, the judge who had signed the original judgment on February 10, 2010, and who had ordered it vacated on March 21, 2011. This hearing is the first hearing for which there is a reporter's transcript in the record. Judge Chaitin heard from counsel and at the conclusion of the hearing ruled that she would sign the judgment, which she did. Judgment was entered on May 18, 2011.

On May 31, 2011, the St. Gemes filed a motion to vacate stipulation and set aside judgment, set for hearing on June 2 (motion to vacate). The motion to vacate was brought under Code of Civil Procedure[4] section 473, subdivision (b) based on "surprise" due to claimed "change in the underlying conditions . . . ." The St. Gemes argued, as they had in opposing entry of judgment, that Chevy Chase failed to perform its

[3] The parties below referred to an April 7, 2011 ex parte application, and the St. Gemes opposed some form of request by Chevy Chase for entry of judgment. However, any request from Chevy Chase requesting judgment is not reflected in the register of actions.

[4] Subsequent statutory references are to the Code of Civil Procedure.

obligations under the stipulation by not providing a repurchase price in a timely manner.[5] They also argued, again as they had in opposing entry of judgment, that the stipulation for judgment was not enforceable under section 664.6.

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[5] This is the claimed surprise as articulated below:

"Since entering into the Stipulation, PLAINTIFF has failed to take any reasonable, good faith steps to establish a repurchase price for the Property, or to otherwise facilitate the repurchase of the Property. On March 25, 2010, PLAINTIFF'S attorney communicated to PETER a repurchase price of $11,647,304.13. However, PLAINTIFF'S attorney also stated that the quoted price would only be good through March 31, 2010. This was just 4 business days later.

"Subsequently, PLAINTIFF'S attorney refused to provide to DEFENDANTS a repurchase price that would be good through April 9, 2010, which was the expiration date set out in the Stipulation. When DEFENDANTS transmitted a timely offer of purchase to PLAINTIFF, the PLAINTIFF did not respond, and instead commenced to seek to reduce the stipulation to a judgment.

"PLAINTIFF also assured DEFENDANTS that it was working on providing them with a repurchase price . . . This was important for DEFENDANTS to have because the lenders from whom they were seeking financing required proof of purchase price from the seller. DEFENDANTS never received this. On March 23, 2010, DEFENDANTS learned that the PLAINTIFF'S attorney had changed his mind and that the PLAINTIFF would not provide a repurchase price on bank letterhead. This was a breach of the Stipulation's provision that the Plaintiff will take all steps necessary to effectuate the terms of this agreement, including preparing and executing necessary documents.

"The fact is that, while DEFENDANTS have been unable to repurchase the Property, it is not because they have refused to abide by the terms of the Stipulation. Rather, they have found themselves dealing with a "seller" that attempted to change the terms of the Stipulation, and then ignored DEFENDANTS' timely offers to repurchase. Implied into the requirement that DEFENDANTS repurchase the Property is the requirement that PLAINTIFF act in good faith to facilitate said repurchase. Such good faith did not exist in this transaction.

"The court should thus set aside the stipulation. DEFENDANTS entered into the Stipulation in reliance on PLAINTIFF'S promise to allow them to repurchase the Property. DEFENDANTS changed their position in reliance on PLAINTIFF'S promises. Such reliance was to DEFENDANTS' detriment in that PLAINTIFF acted in bad faith, actively working against DEFENDANTS' efforts to repurchase the Property. DEFENDANTS could not have anticipated this at the time they entered into the stipulation. These changed conditions support a finding that the stipulation should be set aside."

The motion to vacate came on for hearing on June 2, 2011. The transcript of that hearing indicates that the motion papers were not timely filed or, if they were, had not made their way to the court. Judge Chaitin nevertheless heard from counsel at some length, at the conclusion of which she ordered the motion continued to June 16.

The hearing on June 16 was brief indeed, the transcript less than a page. It reads as follows:

"THE COURT: The court had placed this on calendar today to give a decision on defense counsel's motion to set aside the judgment.

I have reviewed all the paperwork yet again, reviewed all the cases, and reviewed your arguments. The court will deny the motion."

No written order memorializing the June 16 ruling was ever filed. Apart from the transcript of the hearing, the order denying the motion to vacate is reflected only as a docket entry on June 16, 2011.

On August 16, 2011, the St. Gemes filed a notice of appeal. It states they are appealing from the order dated "6/16/11," described by them as "an order after judgment under Code of Civil Procedure Section 904.1(a)(2)." The St. Gemes filed no appeal from any judgment.

DISCUSSION

Introduction and Summary of Argument

The St. Gemes have filed an "Appellant's Amended Opening Brief" that is hardly a model of appellate advocacy. It does not, for example, even demonstrate that the appeal is from an appealable order. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126 ["The existence of an appealable judgment is a jurisdictional prerequisite to an appeal. A reviewing court must raise the issue on its own initiative whenever a doubt exists as to whether the trial court has entered a final judgment or other order of judgment made appealable by Code of Civil Procedure section 904.1."].) Moreover, the brief makes repeated references to claimed facts without record reference—indeed, to facts that are apparently contradicted by the record. Beyond all that, much of their brief appears to be a verbatim rehash of the papers filed below. It is most improper.

We nevertheless consider the arguments the St. Gemes raise, which are that Judge Chaitin committed "reversible error" in "declining" to "vacate the stipulation," for three separate reasons: (1) "despite the breach by [Chevy Chase]"; (2) "despite the failure of [Chevy Chase] to actually sign the stipulation"; and (3) "despite it being entered ex parte, rather than on noticed motion." Assuming the appeal is properly before us,[6] we conclude it has no merit.

Judge Chaitin Properly Refused to Vacate the Judgment

The St. Gemes's first argument begins as follows, in language identical to that set forth below:

" 'The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect.' (Cal. Civ. Proc. § 473(b).)

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[6] A denial of a section 473 motion can be appealed only if the underlying judgment is appealable. (*See Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 680.) A stipulated or consent judgment is " 'a judgment entered by a court under the authority of, and in accordance with, the contractual agreement of the parties [citation], intended to settle their dispute fully and finally [citation].' " (*City of Gardena v. Rikuo Corp.* (2011) 192 Cal.App.4th 595, 600; accord *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 400.) " 'As a general proposition, a party may not appeal a consent judgment.' " (*City of Gardena v. Rikuo Corp., supra*, 192 Cal.App.4th at p. 600; *Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1438.) "[B]y consenting to the judgment or order the party expressly waives all objection to it, and cannot be allowed afterwards, on appeal, to question its propriety, because by consenting to it he has abandoned all opposition or exception to it." (*Norgart v. Upjohn Co., supra,* at p. 400.)

The very terms of the stipulation indicate that the St. Gemes intended the stipulation to settle their dispute fully and finally. Paragraph 9 of the stipulation states, "Defendant agrees not to file any pleadings in this action or, if Defendant has previously filed a pleading in this action, then Defendant agrees not to file any further pleadings in this action. Further, Defendant hereby waives Defendant's right to contest this action including, but not limited to, *the filing of a motion to set aside the judgment(s), the filing of an appeal of the judgment(s), the right to seek a stay of the writ of possession and/or lockout, and the right to seek relief from forfeiture.*" (Italics added).

"A settlement may be set aside under CCP § 473(b) where special circumstances exist in rendering its enforcement unjust, such as when 'surprise' results from a change in the underlying conditions that could not have been anticipated. (*Roth v. Morton's Chefs Services, Inc.* (1985) 173 Cal.App.3d 380.)

"A court, in the interest of fairness, may relieve a party from the effect of a stipulation. (*Marriage of Kerry* (1984) 158 Cal.App.3d 456, 465.)

"Thus, while public policy supports the enforcement of settlement agreements, the court can set aside a settlement where its enforcement would be unjust. Injustice will be found where the underlying conditions change in a manner that could not have been anticipated when a party entered into the settlement, and such surprise would cause damage to the party."

Those boilerplate principles might apply to some case. They certainly do not apply here, as we find no "surprise" or any "fairness" that could support the St. Gemes.

Section 473, subdivision (b) states that a court "may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." This part of section 473 is recognized as invoking the trial court's discretion, and the decision of the trial court shall not be disturbed on appeal absent a clear showing of abuse. (*Hearn v. Howard* (2009) 177 Cal.App.4th 1193, 1200.) The trial court's discretion is not unlimited, however, and must be " ' " ' "exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." ' " ' " (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 695.) Thus it is said that " ' "Section 473 is often applied liberally where the party . . . moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted. [Citations.] . . . [Citations.] [¶] Moreover, because the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default [citations]. Therefore, a trial court order denying relief is scrutinized more carefully than an order

permitting trial on the merits. [Citations.]" ' " (*Fasuyi, supra,* 167 Cal.App.4th at p. 695, citing *McCormick v. Board of Supervisors* (1988) 198 Cal.App.3d 352, 359-360.)

Those rules, however liberal they be, do not avail the St. Gemes here. They have not shown any right to relief. (*Hearn v. Howard*, *supra*, 177 Cal.App.4th at p. 1200; *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1420; *Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625.)

As noted above, the St. Gemes contend they are entitled to relief under the discretionary provision because their failure to repurchase the property in accordance with the stipulation was the result of "surprise." They claim that Chevy Chase "failed to take any reasonable, good faith steps to establish a repurchase price" in March and April of 2010, alleged bad behavior that constituted "surprise" due to changes in the underlying conditions. They are wrong.

"Surprise" under section 473 refers to " 'some condition or situation in which a party to cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against.' " (*Credit Managers Assn. v. National Independent Business Alliance* (1984) 162 Cal.App.3d 1166, 1173; *Baratti v. Baratti* (1952) 109 Cal.App.2d 917, 921.) Such is not present here.

It is perhaps enough to note that the St. Gemes have not shown that Chevy Chase was under any duty to provide an offer, as the stipulation does not say that. Regardless, any objective reading of the facts shows that Chevy Chase provided a repurchase price for the property on March 23, 2010, and again on March 25. Then, on February 9, 2011—and months after the deadline to repurchase the property had expired—Chevy Chase again offered a purchase price. Each time, the price expired by its terms or the St. Gemes rejected Chevy Chase's proposal. In sum and in short, the St. Gemes missed their opportunity to repurchase the property several times. There was no surprise. Judge Chaitin did not abuse her discretion by denying the St. Gemes's motion to vacate.

Section 664.6 does not Assist the St. Gemes

Section 664.6 provides as follows:

"If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

The St. Gemes's second argument is that a signature from a Chevy Chase representative was required for the stipulation to be enforceable. We reject the argument, for several reasons.

As noted above, the document the St. Gemes signed was a "Stipulation for Judgment," signed on the day the unlawful detainer was scheduled for trial. The judgment itself was a San Francisco County court form MCF # 178, entitled "Unlawful Detainer Judgment Pursuant to Stipulation," used as a common way of resolving unlawful detainer cases.

The stipulation provided that the parties agreed that entry of judgment was to be a ministerial act, with the judgment to be filed immediately following the filing of the stipulation.

Section 664.6 applies to "a writing signed by the parties outside the presence of the court . . ." A stipulation for judgment *filed with the Court* is plainly not such a writing "outside the presence of the court." The St. Gemes do not cite any case holding that such a stipulation is subject to section 664.6.[7]

[7] This factor distinguishes the stipulation here from the true "settlement agreements" at issue in *Levy v. Superior Court* (1995) 10 Cal.4th 578, 580 and the few other cases cited by the St. Gemes. (*See Gauss v. GAF Corp.* (2002) 103 Cal.App.4th 1110, 1114-1115 [settlement agreements signed outside of court and not filed with court]; *Stewart v. Preston Pipeline Inc.* (2005) 134 Cal.App.4th 1565, 1569-1570 [settlement agreement signed at mediation and not filed with court]; and *Robertson v, Chen* (1996) 44 Cal.App.4th 1290, 1292-1293 [no document signed even by lawyers].

Nor do the St. Gemes cite any case that holds that the signature requirement applies against the party which is attempting to enforce the agreement, as opposed to the party against whom it is sought to be enforced.

But assuming without deciding that the stipulation is a "settlement" within section 664.6, it would still not avail the St. Gemes. For even if not enforceable under section 664.6, settlements signed only by the attorney may be enforceable other ways, such as in a separate proceeding or in a separate suit in equity. (*See Levy v. Superior Court, supra,* at p. 586, fn. 5; *Harris v. Rudin, Richman & Appel* (1999) 74 Cal.App.4th 299, 306.)

Finally, the St. Gemes acted pursuant to the stipulation from late February 2010, when it was signed, until at least April 2011 before ever raising any issue that the stipulation was not enforceable because it was not signed by Chevy Chase. This, we would conclude, would estop the St. Gemes from any belated attack based on the claimed invalidity of the stipulation. (*See In Re Marriage of Burkle* (2006) 139 Cal.App.4th 712, 751 [wife estopped to claim that postmarital agreement void and unenforceable.]; *Merry v. Garibaldi* (1941) 48 Cal.App.2d 397, 402 [owner of property, knowing that forged deed had been delivered to innocent purchaser, remained silent]; *Lemat Corp. v. American Basketball Assn.* (1975) 51 Cal.App.3d 267, 276 [corporation estopped to challenge contract invalid for lack of authorization by directors, where benefits of contract were retained].

As noted, the St. Gemes make a third argument, that notice of a contested hearing was required before judgment could be entered. Such argument was not made below in the St. Gemes's motion to vacate. We will thus not consider it here. The rule is that theories not raised in the trial court cannot be asserted for the first time on appeal, a rule based on principles of fairness, estoppel, and waiver. (*See generally Giraldo v. Department of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251; *Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767; *Doers v. Golden Gate Bridge Etc. Dist.* (1979) 23 Cal.3d 180, 184-185.)

DISPOSITION

The order denying the motion to vacate stipulation and set aside judgment is affirmed. Chevy Chase shall recover its costs on appeal.

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Richman, J.

We concur:

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Kline, P.J.

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Haerle, J.